No. 80-483

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MICHAEL RODAK, JR., CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ST. JOE MINERALS CORPORATION, *Petitioner,*

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL., *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF PETITIONER

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In its brief in opposition to St. Joe Minerals Corporation's (St. Joe) petition for a writ of certiorari, Respondent Environmental Protection Agency (EPA) urges this Court to deny the petition because, in EPA's view, the Court of Appeals was correct in upholding EPA's promulgation under the Clean Air Act of the national primary ambient air standard for lead. In its attempts to justify those portions of the decision below that address the Administrator's margin of safety methodology, EPA makes, and perhaps could not avoid making, arguments which are fundamentally

irreconcilable. EPA's inability to devise a consistent theory to support the decision below underscores the need for this Court to consider the timely and important issues raised by St. Joe regarding the scope of the Administrator's authority to regulate the nation's ambient air without regard for competing societal needs.

1. Respondent EPA raises contradictory legal arguments both of which are based upon the failure of Section 109 of the Clean Air Act (42 U.S.C. § 7409 (Supp. II)) to set forth those factors which must be considered by EPA in determining an "adequate margin of safety" (i.e., the extent to which primary air quality standards should be made more stringent than the level of protection required to protect against *known* health risks). In doing so it becomes caught on the horns of a dilemma of its own creation.

The Agency thus argues, at one point, that the Act's failure to state expressly that economic and technological feasibility are factors to be considered by the Administrator in making margin of safety determinations totally precludes their consideration in that process.[1] Yet, at another point, EPA argues that this very same failure of Congress to identify relevant factors in Section 109 does not amount to an unconstitutional delegation of legislative power because "the Administrator has interpreted Section 109 to provide further criteria that constrain him in choosing an adequate margin of safety . . . ."[2]

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[1] Brief for the Environmental Protection Agency in Opposition (EPA Opposition) at 15, 17.

[2] *Id.* at 17-18, n. 20. EPA goes on to identify the following as among the factors to be considered by the Administrator in mak-

It cannot be both ways. Either EPA can look beyond Section 109 for relevant factors to be applied in its margin of safety determinations or it cannot. If it can, then it is not true that the failure of Section 109 to articulate factors precludes their consideration and certainly among those that must be considered are the public "welfare" and "productive capacity" objectives of the Act, clearly stated in Section 101 (42 U.S.C. § 7401 (Supp. II)), which necessarily include economic and technological feasibility. If EPA cannot look beyond the sparse language of Section 109, then the Administrator is indeed making margin of safety determinations without necessary Congressional guidance.

EPA's attempt to fashion a middle ground to avoid its own dilemma, by selectively excluding economic and technological feasibility factors from its "adequate margin of safety" determinations, can only be characterized as arbitrary and unfounded. Beyond its inconsistency with the already noted broad statement of the Act's societal objectives expressed in Section 101, this tortured position belies statements in the legislative history to the effect that fulfillment of the Act's objectives necessitates attention to economic and tech-

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ing the margin of safety determination: "the severity and reversibility of the health effects, the types of evidence and degree of uncertainty concerning known or suspected health effects, and the size of the population risk." *Id.*

Significantly, St. Joe has consistently argued that economic and technological feasibility were only two among many factors to be considered. As the Court of Appeals acknowledged, "[o]ther factors that should, in St. Joe's view, be considered are the severity of the associated health effects and the adequacy of the scientific base for determination of the health protective threshold level." App. A. at 31a. *See* St. Joe Minerals Corporation Petition for a Writ of Certiorari (Petition), at 6.

nological feasibility considerations. *E.g.*, Petition, at 9 & n.9 (and citations appearing therein). It is further ironically at odds with the Administrator's own well-established position that these very same factors are to be considered in issuing air emission standards for hazardous pollutants under the similar but more stringent "ample [not merely adequate] margin of safety" provision of Section 112 of the Act. *E.g.*, *id.* at 11 & n.13 (and citations appearing therein). *Compare* Section 112 of the Clean Air Act, 42 U.S.C. § 7412 (Supp. II) *with* Section 109 of the Clean Air Act, 42 U.S.C. § 7409 (Supp. II).

2. EPA frankly concedes that the Administrator did not make two "separate and distinct" decisions in determining the pollution level required to protect the public health and the adequate margin of safety to be added beyond that level; it contends, however, that he did not have to make such a delineation between the two. EPA Opposition, at 17. It persists in this position despite its additional concession that the Administrator is required to consider factors in his margin of safety determinations that do not enter into his determination of health protective levels.[3]

Where distinct elements of a standard require the consideration of different factors, it is plain that separate consideration of each element is necessary to assure adherence to the statutory scheme. Moreover, under well established principles of administrative law, this separate consideration must be clearly articulated to enable reviewing courts to perform their function

[3] "[T]he administrator has interpreted Section 109 to provide further criteria that constrain him in choosing an adequate margin of safety . . . ." EPA Opposition, at 17-18 n.20.

of determining whether the Administrator's decisions have a rational basis.

CONCLUSION

For the reasons stated herein, as well as those stated in the original petition, it is respectfully submitted that St. Joe's petition for a writ of certiorari should be granted.

Respectfully submitted,

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